

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

9/28/00

KRyan

Cancellation No. 27,719

Fishing Unlimited Production, Inc.

v.

Richard Johnson

**Before Quinn, Wendel, and Bottorff, Administrative Trademark
Judges.**

By the Board.

Introduction And Background

This case now comes up for consideration of respondent's October 5, 1998 motion for judgment on the pleadings which, pursuant to the Board's February 4, 1999 order we are treating as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(c).

Respondent Richard Johnson is the owner of Registration No. 2,142,487 for the mark THE FISHING LINE in typed form. Respondent's registration, which issued on March 10, 1998, covers "educational radio programs on the subject of fishing" in class 41.¹ The date of first use identified in the registration is April 1, 1995.

¹ The registration arose from application Serial No. 75/241,443, filed February 13, 1997.

On May 18, 1998, Fishing Unlimited Productions, Inc. petitioned to cancel respondent's registration. As its sole ground for cancellation, petitioner alleges likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d). Specifically, petitioner alleges that it has continuously used the marks THE FISHING LINE and THE FISHING LINE WITH KEVIN MINEO throughout the western United States since as early as May 2, 1996 in connection with petitioner's weekly talk radio program directed to fishing and related topics, and that respondent's mark, as used in connection with educational radio programs on the subject of fishing, so resembles petitioner's marks as to be likely to cause confusion, to cause mistake, or to deceive.²

In his answer to the petition to cancel, respondent admits that he owns Registration No. 2,142,487, that said registration issued on March 10, 1998, and that the registration sets forth a date of first use in interstate commerce of April 1, 1995. Respondent denies all other essential allegations in the petition to cancel. Additionally, respondent asserts as affirmative defenses that petitioner has failed to state a claim upon which relief may be granted, that petitioner has failed to state facts sufficient to establish its standing to petition to cancel

² Petitioner also has alleged "substantial common law rights and interest in its mark" and "valuable goodwill" developed "through substantial advertising and promotion." In the petition to cancel, petitioner does not expressly allege priority of use, fraud, or ownership of any U.S. registrations or applications for related marks.

respondent's mark, and that respondent, not petitioner, has priority of use in the asserted mark THE FISHING LINE. These affirmative defenses form the bases for the motion now before us.³

The Board initially considered respondent's October 5, 1998 motion for judgment on the pleadings on February 4, 1999. By order of that date, the Board indicated that respondent's October 5, 1998 motion would be treated as a motion for summary judgment and also decided several other outstanding contested motions in this proceeding. Specifically, the Board granted respondent's September 29, 1998 motion to extend time to respond to petitioner's discovery requests, denied petitioner's October 22, 1998 motion to amend the petition to cancel to add a fraud claim, denied petitioner's October 22, 1998 cross-motion for summary judgment on the proposed fraud claim, set a schedule for supplemental briefing of respondent's October 5, 1998 motion under Fed. R. Civ. P. 56, and allowed petitioner time to file a motion under Fed. R. Civ. P. 56(f).

In response to the Board's February 4, 1999 order, respondent filed a supplemental brief on March 8, 1999 which attached additional evidence and incorporated arguments and evidence previously submitted by respondent on October 5, 1998 and November 12, 1998. Petitioner did not file a motion under

Fed. R. Civ. P. 56(f); however, on April 9, 1999, petitioner filed its additional brief in opposition to respondent's motion for summary judgment. In that brief, petitioner sought to incorporate by reference petitioner's briefs of October 22, 1998 and December 7, 1998, both which were filed in opposition to respondent's motion for judgment on the pleadings. Then on April 22, 1999, respondent filed a supplemental reply brief.

The Parties' Arguments And Evidence

In support of his motion for summary judgment, respondent argues that petitioner cannot succeed on its pleaded claim under Section 2(d) of the Trademark Act because respondent is the senior user of the mark THE FISHING LINE and because petitioner has neither alleged, nor proven through affidavit or documentary evidence or otherwise, that petitioner has prior use of its mark THE FISHING LINE. Respondent further contends that he is entitled to summary judgment in his favor because there are no genuine issues of material fact in this case and that respondent's priority evidence is unrebutted.

Respondent has proffered into evidence a declaration and supplemental declaration of respondent Richard Johnson with attached exhibits.⁴ Mr. Johnson, as "creator, producer and

³ These technically are not affirmative defenses, but rather go to the sufficiency of petitioner's case.

⁴ We observe an October 1, 1998 declaration and a March 4, 1999 supplemental declaration of Mr. Johnson. The following exhibits were attached to the first Johnson declaration:

show host" of THE FISHING LINE radio program states that the decision to adopt the involved mark was made on April 1, 1995, that pre-broadcast publicity and production activities under the involved mark commenced in April, 1995, that the inaugural broadcast of his radio show aired on May 6, 1995 on radio station WGBB, that respondent's radio program reaches listeners within and outside the New York state border, and that respondent in good faith began using the involved mark at least as early as April 1, 1995 and has continued to use the involved mark to the present.

As evidence of use of his mark in interstate commerce, respondent submits with his November 12, 1998 brief a

Exhibit 1: photocopy of the involved registration, U.S. Reg. No. 2,142,487 for the mark THE FISHING LINE.

Exhibit 2: photocopy of another registration owned by respondent, U.S. Reg. No. 2,144,451 for a design of fishermen with fishing poles.

Exhibit 3-a: sample copy of a promotional poster for the first broadcast of respondent's radio talk show "starting, Saturday, May 6th".

Exhibit 3-b: copy of April 21, 1995 and May 1, 1995 receipts for the sale of flyers and posters to respondent "Richard Johnson The Fishing Line."

Exhibit 3-c: copies of WGBB Liberty Broadcasting of New York Incorporated invoices for radio air time issued to respondent for a "block show", including references to "FISHING LINE" as advertiser and several 1995 start dates, the earliest of which was listed as "05-06-95."

Exhibit 3-d: copy of June 8, 1995 invoice allegedly for respondent's purchase of letterhead business stamp bearing the concerned mark.

Exhibit 3-e: Letter dated October 1, 1998, from Bernard Spigner, Station Manager of WGBB to respondent, stating range of broadcast signals of the WGBB station reaching the tri-state area, extending from New Jersey shore communities to Westchester County, New York and to Fairfield County, Connecticut.

An audiocassette was submitted as an exhibit to the supplemental Johnson declaration, which includes a recording of the inaugural radio broadcast of respondent's THE FISHING LINE radio talk show.

declaration of Benjamin Lloyd Mevorach, formerly Station Manager for WGBB. Mr. Mevorach attests to personal knowledge of the range of signal strength of WGBB broadcasts.

In opposition to respondent's motion for summary judgment, petitioner primarily argues that respondent has not met his summary judgment burden, asserting that a genuine issue of material fact exists as to the validity of respondent's registration and the date of first use of respondent's mark. Petitioner contends that respondent's actual date of first use remains undetermined and unestablished by respondent's own supporting evidence and exhibits. Further, petitioner asserts that respondent's evidence of use is objectionable, uncorroborated, and should be given little to no evidentiary weight. Petitioner has not introduced any affidavits or documentary evidence in support of its opposition to respondent's summary judgment motion.⁵

Discussion And Conclusions

The Board has carefully considered the arguments, submissions, and objections of both parties and the applicable law in regard to respondent's motion for summary judgment. Based on the record now before us and for the reasons

⁵ We observe, however, that petitioner submitted a proposed amended petition to cancel as an exhibit to its cross-motion for summary judgment. However, this is irrelevant to our consideration of respondent's motion herein in view of the Board's prior decision denying petitioner leave to amend its pleading.

discussed below, we must conclude that summary judgment is appropriate in this case.

The purpose of summary judgment is to avoid an unnecessary trial where additional evidence would not reasonably be expected to change the outcome. *See Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 730 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984). See also TBMP §528.01 and cases cited therein.

Generally, summary judgment is appropriate in cases where the moving party establishes that there are no genuine issues of material fact which require resolution at trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).⁶ An issue is material when its resolution would affect the outcome of the proceeding under governing law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); and *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990).

⁶ Rule 56 of the Federal Rules of Civil Procedure is made applicable to proceedings before the Trademark Trial and Appeal Board by 37 C.F.R. §2.116(a) (1989). Rule 56 provides in pertinent part:

(c) ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law....
....

(e) ... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

Where a motion for summary judgment is made and supported in accordance with Fed. R. Civ. P. 56, it is incumbent on the non-movant in a summary judgment proceeding to proffer countering evidence sufficient to create a genuine factual dispute. A dispute is genuine, only if, on the entirety of the record, a reasonable jury could resolve a factual matter in favor of the non-movant. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, *supra* at 1786, citing, *Sweats Fashions v. Pannill Knitting Co.*, 833 F.2d 1560, 1562, 4 USPQ2d 1793, 1795 (Fed. Cir. 1987). The party opposing a motion for summary judgment must point to an evidentiary conflict created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant. See *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836, 221 USPQ 561,

564 (Fed. Cir. 1984). See also *Pure Gold, Inc. v. Syntex (U.S.A.), Inc., supra.*

In this case, respondent has met his burden of proof for establishing his entitlement to summary judgment. Respondent submitted competent evidence of respondent's pre-broadcast publicity and production activities relative to his radio program as early as April, 1995 and competent evidence that his mark, THE FISHING LINE, was used in interstate commerce in connection with a radio program broadcast on fishing-related subjects, as early as May 6, 1995.

Inasmuch as respondent raised the issue of priority in his motion for summary judgment, it is incumbent on petitioner to show there is a genuine issue as to priority in this proceeding.⁷ Based on the record now before us, it is our conclusion that petitioner has failed to proffer countering evidence sufficient to create a genuine factual dispute as to respondent's asserted use of his mark and as to priority. See *Octocom Systems Inc. v. Houston Computers Services Inc., supra* at 1786.

It is our view that petitioner's arguments consist of nothing more than mere criticisms of respondent's evidence.

⁷ It is well established that likelihood of confusion under section 2(d) of the Trademark Act cannot be recognized where one claimed to be aggrieved by that confusion does not have a right superior to his opponent's. In this case as in all cancellation proceedings founded on §2(d), petitioner must prove it has proprietary rights in its pleaded marks to demonstrate likelihood of confusion, whether by ownership of a registration, prior use of a technical "trademark," prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity. See *Otto Roth & Co., Inc. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43, 44, 45 (CCPA 1981).

Further, petitioner disputes certain factual issues which are immaterial to those raised and petitioner raises unwarranted objections to respondent's evidence of first use. Petitioner has not presented any affidavit or documentary evidence to rebut respondent's asserted use in opposition to respondent's motion for summary judgment. Additionally, no evidence of petitioner's date of first use of petitioner's mark was introduced. Petitioner neither pleads, nor argues that it has priority in the mark THE FISHING LINE.

Respondent has submitted evidence of activities in connection with his radio program as early as April, 1995 and evidence of use of the involved mark on the air during a May 6, 1995 broadcast. Any use by respondent during 1995, whether in April, or May 1995, clearly precedes respondent's filing date of his application to register the involved mark and the May 2, 1996 pleaded date of first use of petitioner's mark. Accordingly, even if we were to assume different dates of first selection, first promotion, first radio broadcast in interstate commerce of respondent's mark, and first use as recited in U.S. Reg. No. 2,142,487, these differences are legally immaterial to the issue of priority in this case. Moreover, we are not persuaded by petitioner's contention that differences between these asserted "first dates" casts a cloud of general uncertainty over respondent's evidence of use such that all of respondent's evidence should be disregarded. We see no basis in the record for so doing. The simple

undisputed fact remains that each of these dates precedes the earliest date upon which respondent is entitled to rely.

We reject as improper petitioner's renewed arguments that respondent is not entitled to judgment in his favor on the grounds of alleged fraud and alleged false statements by respondent during prosecution of application Serial No. 75/241,443, the application which eventually registered under U.S. Reg. 2,142,487. In the Board's February 4, 1999 order, the Board already considered, and denied, petitioner's motion to amend the petition to cancel to add a fraud claim. The Board also denied petitioner's cross-motion for summary judgment on that proposed fraud claim. Under the circumstances, we decline to reconsider petitioner's asserted fraud and bad faith arguments.

Furthermore, we need not resolve the issue of whether respondent's precise date of first use was sometime in April, 1995 or in May, 1995. Nor must we determine the effect of respondent's pre-broadcast publicity and production activities on respondent's date of first use and priority. In deciding a motion for summary judgment, the Board may not resolve an issue of fact; it may only determine whether a genuine issue of material fact exists. See *Meyers v. Brooks Shoe Inc.*, 912 F.2d 1459, 16 USPQ2d 1055 (Fed. Cir. 1990).

While we agree with petitioner's statement that the dates of first use included in the involved registration are not

competent evidence of the date of first use of respondent's mark⁸, we view petitioner's objections to respondent's evidence overall unwarranted and unsubstantiated. We find no persuasive evidence of record which might cause us to question the credibility of the declarants, Mr. Johnson and Mr. Mevorach, the accuracy of the declarants' statements, or the accuracy of the evidence attached to the proffered declarations. Nor do we find the exhibits attached to the proffered declarations to be ambiguous or misleading. The proffered declarations adequately describe and authenticate these exhibits and there is nothing in these exhibits that negates or contradicts the declarants' statements.⁹

Accordingly, the Board finds, as a matter of law, that there is no genuine dispute as to respondent's use of the mark THE FISHING LINE sometime in 1995 and at least as early as May 6, 1995. Inasmuch as petitioner has failed to introduce evidence of the date of first use of its own mark and to rebut the asserted prior use of respondent's mark by contrary evidence, we conclude that priority lies with respondent in this case and there are no genuine issues of material fact in

⁸ Although respondent need not submit a status and title copy of his involved registration U.S. Reg. 2,142,487 in order for us to consider that registration herein, we cannot consider respondent's Exhibit 2 (the photocopy of U.S. Reg. No. 2,144,451) inasmuch as a proper status and title copy of that design registration has not been submitted. See Trademark Rules 2.122(b)(1) and (d)(2). See also TBMP §§703 and 704.

⁹ Although we find no merit in petitioner's objections, we note that our decision to grant summary judgment herein would be unchanged had we excluded from evidence respondent's Exhibit 3-d of the October 1, 1998 Johnson declaration (the copy of the

dispute that require trial for their resolution. Under the circumstances, petitioner cannot prevail on its claim under section 2(d) of the Trademark Act.

We **grant** respondent's motion for judgment on the pleadings which we have treated as a motion for summary judgment and accordingly, grant summary judgment in favor of respondent. See Fed. R. Civ. P. 12(c) and 56(c).

Judgment is hereby entered against petitioner and the petition to cancel is dismissed with prejudice.

T. J. Quinn

H. R. Wendel

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board